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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER,

Appellant,

vs.

THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF RHODE ISLAND

No. 9264

STATE

v.

WILLIAM B. FOWLER

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellant files his statement discussing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is not yet reported. The opinion of the Supreme Court of Rhode Island is made a part hereof, as Appendix A. An earlier opinion answering certified questions in this case appears at 83 Atl. 67. It is Appendix B.

Question Presented

Does the prohibition in the ordinance of holding a meeting for, and speaking in the park upon, a religious or political subject, both on its face and as construed and applied, a violation of the Federal Constitution because it amounts to a prohibition of the exercise or an illegal burden and abridgment of the appellant's rights of freedom of speech, assembly and worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

The question was raised by motion to quash and to dismiss filed in the Superior Court of New Hampshire. [4-5, 21, 55-56] [1] This question was adversely determined by the Supreme Court of Rhode Island. The entire opinion of the Supreme Court of Rhode Island is a part of this statement as to jurisdiction. See Appendix A and Appendix B at the end of this statement.

Statute Involved

This case draws into question the validity of an ordinance of the City of Pawtucket, duly enacted on August 17, 1916, Chapter 149, which provides as follows:

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The entire ordinance appears at the end of Appendix B at the close of this jurisdictional statement.

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[1] Numbers appearing herein within brackets refer to the pages of the stenographic report of the proceedings at the trial in Superior Court filed in the Supreme Court of Rhode Island.

Constitutional Provisions Involved

Section 10 of Article I of the Constitution of the United States, relied upon in this case, reads as follows:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The First Amendment, relied upon in this case, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent part of the Fourteenth Amendment which appellant relies upon reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of Rhode Island affirming the judgment of the Superior Court was entered August 12, 1952. See Appendix A containing the opinion of the Supreme Court of Rhode Island. The judgment

affirming the judgment of the trial court, therefore, became final on August 12, 1952. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Nature of Case

This is a criminal case. It is an appeal from a judgment affirming a judgment of conviction on an appeal trial *de novo* in the Superior Court. The appellant was first proceeded against in the District Court of Rhode Island, Tenth Judicial District at Pawtucket, by complaint. He was charged with violating the ordinance in question on September 3, 1950. The complaint and warrant, among other things, charged as follows:

> "On the 3rd day of September A. D. 1950, with force and arms, William B. Fowler alias John Doe laborer, of said Pawtucket, did violate Section 11 of Chapter 149 of the ordinances of the City of Pawtucket in that he did address a religious meeting in a public park, to wit; Slater Park against an Ordinance of the City of Pawtucket and against the Statute and the peace and dignity of the State."

How Constitutional Questions Raised

The constitutional question was raised in a motion to quash and in a motion to dismiss filed in the Superior Court of Rhode Island [4-5, 21, 55-56]. The question presented in that court was considered and overruled [58]. Each holding of the trial court was presented on appeal to the Supreme Court of Rhode Island and duly assigned as error. Each federal question presented upon this appeal also was presented to the Supreme Court of Rhode Island in the brief, on oral argument. See Appendix A and Appendix B of this statement as to jurisdiction.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257 (a).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this court.

Statement of Case

The Proceedings

The appellant pleaded not guilty in the District Court. He was found guilty and fined. He appealed to the Superior Court. On the first hearing before the Superior Court of Rhode Island the case was reserved and at an earlier term transferred to the Supreme Court of Rhode Island. The parties there stipulated the facts. The Supreme Court of Rhode Island held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Pawtucket. 83 Atl. 2d 67.

The case was tried in the Superior Court following the opinion of the Supreme Court of Rhode Island. The appellant pleaded not guilty [5]. A jury trial was waived and the case was tried to the judge alone [5-6]. At the close of the evidence a motion for judgment of acquittal was made [21, 55-56]. On October 22, 1951, the court rendered a judgment convicting appellant [57]. He was fined $5.00 [58].

The Facts

It was stipulated that Slater Park in the City of Pawtucket has an area of approximately 194 acres; that within

the above area are located tennis courts, merry-go-round, bandstand, a lake with rental boats, a baseball field, swings and dandles for children, sixteen fireplaces, animal and bird compounds, extensive formal gardens, natural woodlands, and improved roads.

The parties further stipulated that there was sufficient space in the park for assemblies and that assemblies could be held without interfering with other activities carried on in the park [9].

In the summer of 1950 the local congregation of Jehovah's Witnesses at Pawtucket attempted to get permission to use Slater Park [22]. On application the official gave them a permit to use the park on two Sundays in August, 1950 [22, 25-26].

Appellant is a resident of Arlington, Massachusetts, and is a minister of Jehovah's Witnesses, duly ordained. He acts under the direction of the Watchtower Bible and Tract Society of Brooklyn, the legal governing body of Jehovah's Witnesses [31]. He was invited by the Pawtucket company of Jehovah's Witnesses to deliver a Bible discourse, as a visiting minister, to an assembly in Slater Park in Pawtucket on August 27, 1950 [32]. He accepted the invitation and came to the park in Pawtucket at the time appointed [33].

In Slater Park the congregation had assembled at a suitable place on the grass under the trees about one-half mile from the main entrance of the park. The assembly did not interfere with the use of the park by other persons [35-36]. About 400 persons were present in the assembly of which 250 were strangers who had been invited and 150 were Jehovah's witnesses who were members of the local congregation [38].

What occurred following the bringing of the assembly to order can best be told by the appellant himself. He said "The Pathway to Peace," was the title of his talk. Further

he testified: "after the assembly was brought to order I was introduced as the speaker of the occasion and began my speech, "The Pathway to Peace," I was using President Truman's talk as an illustration of the futility of men's efforts to establish peace by themselves. And then I launched forth into the scriptural evidence to show where we were on the string of time; that we had reached the end of this wicked system of things. . . . I had pointed out that it was a natural desire for all men to want peace; that they had desired that for centuries and they made strenuous efforts down through the centuries to obtain peace. They had failed and failed for an exceptionally good reason, too, and that today instead of peace we have fear and war, trouble and distress amongst the people. It was my purpose to point out from there on the principal reason why they failed, and at about that time I was, within the matter of seconds, surrounded by an impregnable wall of police officers. . . . and immediately Chief Hourigan, and in a very courteous manner, approached me and said to me, 'Mr. Fowler, have you a permit to give this talk?' I replied, 'Chief, you know very well that I need no permit to preach the Gospel.' I had previously informed him of that fact the week before in the police headquarters; that no nation on earth or city or government can issue a permit to Christians to do something God has commanded them to do, therefore, we need no permit to preach the Gospel. And he said then as he repeated, 'I am placing you under arrest for violation of this city ordinance,' and I was escorted very courteously to the police car, surrounded by police officers, and taken to headquarters. . . . I told these two gentlemen that I felt that they had very seriously interfered with the God given rights of Christians in America to exercise their freedom of speech in accordance with the Fourteenth Amendment of the United States Constitution; that we were not there for any evil purpose, but that they knew very well

we had come to that park for the purpose of doing good and, certainly, the people of Pawtucket need some good instructed into them as well as other cities and towns in the country, and that our sole mission was to exalt the name of the living God, Jehovah, and tell the people of Pawtucket that His kingdom was at hand; that that kingdom of righteousness is the only possible solution to the world's trouble and is soon to take over and put an end to this terrible condition. I said, 'You, gentlemen, instead of interfering with Jehovah's witnesses in doing this wonderful work, you should be co-operative with us instead of arresting me. You should have stayed at the park and seen that order was observed and that I was given an opportunity to tell the people of Pawtucket God's message.''

The Question Is Substantial

The question decided by the courts below in this case is identical to the question presented as to the validity of the construction of the ordinance in the companion case to this from New Hampshire, styled *Poulos* v. *State of New Hampshire.* See the statement as to jurisdiction in that case. Although the question was raised properly upon the appeal to the state courts in that case and was mentioned in the first opinion on certified questions, it was evaded on an inadequate procedural determination in the second opinion. The question there presented is whether the unwritten policy of the City Council of Portsmouth, New Hampshire, not to issue permits for the holding of religious meetings in the parks of the city was an abridgment of the rights guaranteed by the First and Fourteenth Amendments.

This Court is called upon to decide in this case whether the written policy expressed in an ordinance prohibiting the holding of religious and political meetings in the parks of Pawtucket is constitutional. In the New Hampshire case

there were provisions for a permit in the ordinance, which ordinance is valid on its face. The permit is denied in all cases where the application is for the holding of a religious meeting. In this case there is no provision for a permit at all. The policy of Pawtucket, Rhode Island, expressed in its ordinance prohibits completely the holding of a religious meeting or the giving of a religious talk in the parks of the city. As far as the inherent invalidity of the policy to prohibit the holding of religious meetings is concerned, it is the same in both cases.

The court below has, for the second time in this case, held that an ordinance which prohibits the holding of religious and political meetings and the giving of speeches on those subjects in public parks is constitutional.

The decision of the court flies in the teeth of the case of *Jamison* v. *Texas*, 318 U. S. 413. There the Court held invalid an ordinance that prohibited the distribution of literature. In this case the ordinance prohibits a meeting and the giving of a speech on two lawful and constitutional subjects in the park. There is no difference between the rights of freedom of press, speech, assembly and worship guaranteed by the First and Fourteenth Amendments against state abridgment. The distinction of the *Jamison* decision because freedom of the press was involved there and not freedom of speech, assembly and worship, as here, is a futile effort by the court below. The court missed the mark. It has failed to make a distinction. The attempted distinction is a distinction without a difference which must be corrected by the Court.

The Court in the *Jamison* case, *supra*, held that an ordinance which prohibited the exercise of constitutional rights on the streets was void. The ordinance in this case prohibits the exercise of such liberties in the park. There is no distinction between prohibition of the exercise of rights on

the streets and in the parks. The fact that literature rather than speech was involved in the *Jamison* case is immaterial. The right of free speech is as strong as the right of free press. Neither can be prohibited as is done by the ordinance in this case.

In *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N. E. 2d 241, the Supreme Judicial Court said that, "Some of these decisions relate to the distribution of printed matter in streets and ways, but it seems plain that in respect to general principles no distinction can be drawn between the right to distribute printed matter and the right of public speech or between the exercise of those rights in public streets and their exercise in public parks."

The court below relied heavily on *Davis* v. *Massachusetts*, 167 U. S. 43. This Court's attention is called to the decision in the *Gilfedder* case, *supra*, where the Supreme Judicial Court of Massachusetts, among other things, said:

"A series of recent decisions by the Supreme Court of the United States has, as we read the cases, established the proposition that the exercise of these rights cannot be wholly precluded in public places such as streets and parks by sweeping general prohibitions and cannot be subjected to the requirement of permits the granting of which is not governed by binding rules adequate to insure the exercise of the rights under reasonable conditions. Perhaps the most completely in point of these decisions are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147 (reversing *Commonwealth* v. *Nichols*, 301 Mass. 584); *Jamison* v. *Texas*, 318 U. S. 413, and *Tucker* v. *Texas*, 326 U. S. 517. Pertinent also in some aspects are *Lovell* v. *Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Murdock* v. *Pennsylvania*, 319 U. S. 105;

Martin v. *Struthers*, 319 U. S. 141, and *Thomas* v. *Collins*, 323 U. S. 516" (321 Mass. 335, 73 N. E. 2d 241).

In commenting on the decision by the Supreme Court in *Davis* v. *Massachusetts*, the court continued:

"The Commonwealth presses upon us the cases of *Commonwealth* v. *Davis*, 162 Mass. 510 (affirmed sub nomine *Davis* v. *Massachusetts*, 167 U. S. 43), and asks us to follow these decisions, while the defendants ask us to overrule them. These cases also turned upon the validity of ordinances forbidding public addresses upon Boston Common without a permit. We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States. That court in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, at page 515, while seemingly doubting *Davis* v. *Massachusetts*, 167 U. S. 43, nevertheless distinguishes that case on the ground, as we understand the opinion, that the ordinance in the *Davis* case was not directed solely at the exercise of the rights of speech and assembly, but was addressed as well to other activities that could constitutionally be prohibited."

Mr. Justice Frankfurter, commenting on *Davis* v. *Massachusetts*, 167 U. S. 43, in his concurring opinion in *Niemotko* v. *Maryland*, 340 U. S. at page 279, said, among other things:

"An attempt to derive from *dicta* in the *Davis* case the right of a city to exercise any power over its parks, however arbitrary or discriminatory, was rejected in *Hague* v. *C. I. O.*, *supra*."

Davis v. *Massachusetts*, 167 U. S. 43, involved a law which required a permit before a speech could be made in the Boston Common. The same decision was relied upon by the state in *Jamison* v. *Texas*, 318 U. S. 413. The unanimous court said: "It relies primarily on *Commonwealth* v. *Davis*, 167 U. S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. . . . Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained."

There are other reasons why *Davis* v. *Massachusetts*, 167 U. S. 43, should not be relied upon. They were urged to the court below by the appellant when the certified questions were argued. The contention was succinctly stated by Mr. Justice Baker in his opinion, which was concurred in by Mr. Justice Capotosto. See *State* v. *Fowler*, 83 Atl. 2d 67; Appendix B herein. Among other things he said: "Also in my opinion *Davis* v. *Massachusetts*, 167 U. S. 43, upon which the majority of the court relies, cannot properly be held to govern the instant case. While it is true that the above-cited case has never been specifically overruled by the Supreme Court of the United States, nevertheless in my judgment that court, in later decisions where it referred to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558, and *Niemotko* v. *State of Maryland*, 19 Law Week 4095 [340 U. S. 268]. See also *Milwaukee County* v. *Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the right of freedom of speech and assembly under the first and fourteenth amendments of the

constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

"In addition it may be noted that in *Commonwealth* v. *Filfedder*, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the first amendment to the constitution of the United States. At page 342 of that opinion the court makes the following comment: 'We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States.'"

The Supreme Court of New Hampshire in *State* v. *Derrickson*, 97 N. H. 91, 81 Atl. 2d 312, said: "At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts*, 167 U. S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent."

Public parks have from time immemorial been used as places of public assembly and delivery of speeches of all kinds upon innumerable occasions (*Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *New Jersey*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558; *Niemotko* v. *Maryland*, 340 U. S. 268), and, contrary to the holding of the court below, "one is not to have the exercise of his liberty of expression in appropriate places abridged

on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U. S. 147, 163.

Appellant in this case stands squarely on all the holdings of this Court declaring that ordinances forbidding the holding of public assemblies in parks and the use of public streets for the purpose of preaching the Gospel are void and unconstitutional. The holding here should be the same as the holding in those cases.

While the court below did not say that the city had the right to keep religious groups out of the parks of Pawtucket under the doctrine of separation of church and state, such doctrine may be considered by this Court in this case. The point was presented in *Niemotko* v. *Maryland*, 340 U. S. 268, but not decided. See 340 U. S. at pages 272-273. It is believed that the question now is clearly presented by the ordinance in this case and must be determined here and now. It is submitted that the case here is controlled by *Zorach* v. *Clauson*, 72 S. Ct. 679 and that *McCollum* v. *Board of Education*, 333 U. S. 203 does not apply.

The position here taken on the lack of constitutional authority in the City of Pawtucket to exclude religious meetings and to prohibit religious talks in the parks of the city is directly supported by *County of Milwaukee* v. *Carter*, 258 Wis. 139, 45 N. W. 2d 90. In that case the ordinance was identical to the one involved here. In that case the facts were the same as those in this case. It involved the holding of a meeting by Jehovah's witnesses in Lake Shore Park in Milwaukee. The court said:

"When, in Article I, Section 3, the Wisconsin Constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict with and subordinate to the First and Fourteenth Amendments of the United States Constitution, which neither make nor

recognize any such limitation. Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred rights by others. The Milwaukee County ordinance purports not to regulate but to prohibit speech in public parks on political as well as religious subjects. Section 47.02(7) provides: 'No sermon, discussion, harangue or speech shall be delivered by any person for political purposes or in connection with the sale of any article or which shall constitute a public criticism or abuse of any religious organization or representative thereof.' Government may, in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable control over when, where and under what conditions public meetings may be held on public property, but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions. Relying entirely on the facts which this record presents, it appears that Milwaukee county's ordinance is void, as in conflict with both constitutions, and the conviction under it is likewise void and must be set aside."

The constitutional prohibition of joinder of church and state is not controlling here. If a public park dedicated by law and regulation to community purposes by the state cannot be so used by a religious group, then by force of the same reason the public streets could be kept back from use by such religious group. The doctrine of separation of church and state ordained in the First Amendment should not be distorted so as to itself become an abridgment of liberty. It would result in just that if the construction contended by the state is accepted here. Since public streets

cannot be withheld from religious organizations for exercise of their constitutional rights of free speech, then by force of the same reason public parks that are open for community metings may be used and cannot be denied to such groups for public meeting purposes.

The contention made by the state and the Supreme Court of Rhode Island in this case that the use of the public park for the public meeting and the delivery of the talk is a violation of the Constitution because it is appropriation of public funds should not be considered seriously. The appropriation is such a slight and inconsequential appropriation as to be unworthy of notice. The doctrine of *de minimis* applies here.

The Court is referred to many cases involving use of public schools for religious assemblies where the rule of *de minimis* has been applied. The identical argument that has been made here by the state was made in those cases. In the decisions, various state courts have held that the use of the school for religious assemblies at times when the school buildings are not used for school purposes is not sectarian use in violation of the Constitution. These holdings were made in decisions rendered prior to the passage of the "Civic Center Acts", which permitted the use of the schools for such purposes throughout the country. See *Nichols* v. *School Directors*, 93 Ill. 61; *School Directors* v. *Toll*, 149 Ill. App. 541; *Hurd* v. *Walters*, 48 Ind. 148; *Baggerly* v. *Lee*, 37 Ind. App. 139, 73 N. E. 921; *Townsend* v. *Hagan*, 35 Iowa 194; *Davis* v. *Boget*, 50 Iowa 11; *Gibbert* v. *Dilley*, 95 Neb. 527, 145 N. W. 999; *Greenbanks* v. *Bantwell*, 43 Vt. 207; *Lagow* v. *Hill*, 238 Ill. 428, 87 N. W. 369.

The use of the school building as an assembly place for racial and religious groups under statutes permitting school trustees to permit the use of school houses, when not in use for school purposes for meetings, entertainments, and occa-

sions where admission fees are charged, if such meetings or entertainments are not under exclusive control and proceeds are not applied for the benefit of a religious sect or denomination or a fraternal or exclusive society, was held not to be unlawful in *Lewis* v. *Board of Education*, 157 Misc. 520, 285 N. Y. S. 164 (modified in other respects in 247 App. Div. 106, 286 N. Y. S. 751, appeal dismissed 270 N. Y. 490, 12 N. E. 2d 172). The court said:

"The manifest vice of the plaintiff's position is that he has confused the racial and religious affiliations of the users of the school buildings with the purpose for which the buildings are used. The restrictions relate to the use. . . . Rather than inimical to the educational policy of the State, or subversive of legitimate use, it is a wholesome thing to have the school buildings, which are maintained at large expense by the taxpayers, used for the purposes and by the groups whose exclusion is here sought. It is the use to which the school buildings are put, and not the identity of the users, that is decisive of the lawfulness of the use."

In *Nichols* v. *School Directors*, 93 Ill. 61, 34 Am. Rep. 160 (1879), it was held that a statute authorizing the directors to grant the temporary use of a schoolhouse, when not occupied by school, for religious meetings, and for such other meetings as the directors might deem proper, and the act of a school district in granting the use of a schoolhouse for religious meetings, was authorized, and did not contravene a constitutional provision that no person should be required to support a place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship, or a provision which forbade any school district from making an appropriation in aid of any church, or for sectarian purposes, or a provision which required all school property to be faithfully applied to the

object for which such gifts or grants were made. The court said:

"It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions. The latter one relates to the subject of a gift or grant, which this schoolhouse is not shown to be, and if it were, it is not perceived wherein an incidental use of the house for the holding of religious meetings, not in any way interfering with school purposes, would in any reasonable sense be inconsistent with its faithful application to the object of the gift or grant. The second provision respects the making of an appropriation or payment from some public fund in aid of any church or sectarian purpose, and it cannot be claimed that this contemplated use of the schoolhouse is such. In what manner, from the holding of religious meetings in the schoolhouse, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly at some future time he might, as a taxpayer, be made to contribute to the expense of repairs, rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the schoolhouse might in that way cause damage in some degree to the building, upon the idea that continued dripping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim, 'De minimis,' etc. The things contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled, without his consent, to contribute to the support of any ministry or place of worship. Such a

matter as the subject of complaint here, we do not regard as within its purview. Religions and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the Constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the schoolhouse. There is no pretense that it is in any way an interference with the occupation of the building for school purposes" (93 Ill. 61, 34 Am. Rep. 160).

The doctrine of *de minimis* was followed in *State ex rel. Conway* v. *District Board,* 162 Wis. 482, 156 N. W. 477. In that case it was held that the offering of a prayer by a Catholic priest or protestant minister at a public school graduation exercise is not sectarian instruction in violation of the Constitution.

The doctrine of *de minimis* should be applied here. It was applied by the Court in *Everson* v. *Board of Education,* 330 U. S. 1, with which compare *Costigan* v. *Hall,* 249 Wis. 94, 23 N. W. 2d 495 and *State ex rel. Van Straten* v. *Milquet,* 180 Wis. 109, 192 N. W. 392. See also "Separation of Church and State in the United States" (1950 Wis. L. Rev. No. 3, pp. 452-453, 455) and "Due Process and Disestablishment" (62 Harv. L. Rev. No. 8, pp. 1343-1344).

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exclude religious assembly from the protection

written into the First Amendment, they would have written the exemption into the Amendment. It is absolutely not permitted for a state or city, or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception which does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds in a public park, it likewise makes secure the right to hold religious meetings therein.

The doctrine of separation of church and state ought properly to be limited to the boundaries fixed by the framers of the First Amendment. What the authors had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the Amendment did not intend to exclude religion from the benefits of freedom of speech and assembly provided for in the first Amendment. In fact, it has been declared that religion occupies a favored position in the law. It is a well-known fact that the states have explicitly provided that places of public worship shall be exempt from taxation. The Supreme Court of the United States has declared that this is a Christian nation. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 471.

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the state requires this Court to discriminate against religious and political assemblies in favor of all other types of assemblies. This Court should not write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine which is an unlawful stretching of the

principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed religious organizations would be discriminated against and the Court would thus misinterpret the guaranty of freedom of assembly appearing in the First Amendment.

There has been no appropriation of Slater Park by Jehovah's witnesses. They have not excluded other organizations from the use of the park. Their use of the park is only incidental and synchronizes with the use of the park by all other organizations in Pawtucket for recreational and other purposes. The so-called appropriation of public funds for a religious use by use of the park for holding religious services is so slight and inconsequential and incidental as to be unworthy of notice by this Court in considering the so-called applicability of the doctrine of separation of church and state.

It is respectfully submitted that the proper holding by this Court should be that religious assemblies stand on the same strong basis under the First Amendment as do assemblies by any other group for any other purpose in a public park. This Court should hold that the use of the park for a religious service is proper and within the strong protecting shield of the First Amendment. The Court should conclude that the ordinance, on its face and as enforced and construed by the City of Pawtucket, abridges the rights of the appellant to freedom of speech, assembly, worship and conscience, contrary to the First and Fourteenth Amendments to the United States Constitution.

The court below unlawfully injects the use of the sound device into the question to be decided in this case. That element is entirely irrelevant. There was no objection to the use of the sound device at any time. The arresting officer testified that it was a lawful and peaceful use of the park, except for the fact that a religious meeting was pro-

hibited. [15-16] The complaint did not charge appellant with unlawfully using a sound device. It charged him with addressing a religious assembly contrary to the provisions of the ordinance. The ordinance does not deal with the use of sound devices.

This Court has frequently held that abuses of the exercise of the right do not justify laws which prohibit or censor the exercise of the right itself. To be valid an ordinance punishing for the use of a sound device in a loud and raucous manner must deal with the abuse of the use and not censor or prohibit the use. Compare *Kovacs* v. *Cooper*, 336 U. S. 77 with *Saia* v. *New York*, 334 U. S. 558. The court below did not have a narrowly drawn zoning ordinance like the Pennsylvania courts had in *Commonwealth of Pennsylvania* v. *Geuss*, 168 Pa. Super. 22, 76 Atl. 2d 500 and 368 Pa. 290, 81 Atl. 2d 522, appeal dismissed *sub nomine Geuss* v. *Pennsylvania*, 342 U. S. 912, which is cited and relied upon by the court below.

There was not an attempt to zone the parks of Pawtucket so as to prohibit a religious meeting in this particular park. The ordinance here prohibited religious and political meetings in all parks of the city. There were no parks anywhere in the city where a religious or political meeting could be held. Such meetings were banned in all public parks in the city.

The court below implies that the City of Pawtucket had limited the dedication of the park. It is said, however, that Slater park "has been maintained as a public park". Being a public park, it was open for all park purposes (including religious and political speeches) in the absence of a specific limitation in the deed to the city or a restricted dedication confining the use to recreation and rest and excluding religious and political meetings. Since there has been no such limitation as a matter of fact it cannot be grafted on to the use of the public park by judicial amend-

ment of the facts. This ruling amounted to an ex post facto law.

A patent inconsistency appears on the face of the opinion of the court below in a statement made which also is contradicted by the facts in the case. The court says that a person using the park for recreation is entitled not to have another person destroy his "rights to use the park for its dedicated purposes of rest and recreation." In the first part of the opinion the court stated that a mere assembly could be held "without unduly interfering with the use of the park by others." It was stipulated in this case that there was space in the park "for assemblies of these kinds and that assemblies can be held without interfering with these other activities." [9-10] The undisputed testimony of the appellant was that the holding of the assembly was at a place in the park where it did not interefere with the other uses of the park by other persons at the same time. He also testified that the group he spoke to was out of sight of any other group using the park for other purposes. [33-36]

The interference of the use of the park by other persons was a fact that had to be proved by the prosecution. There was no such proof received. There is no inference that can be drawn from the testimony that the holding of the assembly and the giving of the talk by the appellant in any way interfered with the use of the park by others. Since the state failed to prove that the use of the park interfered with the rights of others, it is beyond the constitutional authority of the court to find or infer that the use did interfere with the other uses of the park. See *Busey* v. *District of Columbia*, 78 App. D. C. 189, 138 F. 2d 592 at page 595; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Thomas* v. *Collins*, 326 U. S. 516, 529-530; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153. The use of the sound device to address

the 400 persons in the audience did not *per se* constitute interference with the rights of others in the park who were not attending the assembly. *Saia* v. *New York,* 334 U. S. 558.

The vehicle used by the court below collided head-on with the standing decisions of this Court, when that court held that a prohibitory ordinance was regulatory. Regulation is confined to time, place and manner of the exercise of the right. *Schneider* v. *New Jersey,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296. An outright prohibition of the exercise of the right is not regulation. Laws prohibiting the exercise of the rights guaranteed by the Constitution are not valid. Mr. Justice Reed for a majority of the Court in the defunct decision styled *Jones* v. *Opelika,* 316 U. S. 584, said: "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori,* invalid." (316 U. S. at pages 595-596) This case was reversed in 319 U. S. 103, but this particular holding was not.

Prohibition is regulation only when the ordinance deals with the abuse of the exercise of the right. *Kovacs* v. *Cooper,* 336 U. S. 77, is an example of this. There, without reversing *Saia* v. *New York,* 334 U. S. 558, the Court held valid a law which prohibited loud and raucous noises emitted from a sound device on the streets. The ordinance here is not narrowly drawn so as to prohibit an abuse of holding assemblies and giving religious and political talks in a public park. There is no abuse shown. It was not contended in this case that there was an abuse of the right.

The state and the court below are confronted with a record where it is stipulated that the assembly was peaceful and lawful in all respects save and except for the fact that

it was a religious assembly and a religious talk was given to the group in violation of the ordinance.

The court below also struck a discordant legal note. The symphony in the field of civil liberties was marred in the holding that it was necessary to find beyond a reasonable doubt that the ordinance was unconstitutional. It is submitted that in the case of civil liberties guaranteed by the First Amendment there is no presumption of validity but there is a presumption of invalidity unless the state claiming the right to abridge those liberties, shows to the satisfaction of the court that the ordinance is valid. (*Busey* v. *District of Columbia,* 78 App. D. C. 189, 138 F. 2d 592, 595; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Thomas* v. *Collins,* 326 U. S. 516, 526-530; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153.)

Conclusion

Appellant prays that the Court note jurisdiction of this cause for final hearing upon the question involved in accordance with the rules of the Court, because the court below has disposed of an important and substantial federal question in a way that is in conflict with the Constitution of the United States, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

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APPENDIX A

SUPREME COURT

Ex. &c. No. 9264.

STATE

v.

WILLIAM B. FOWLER

OPINION

FLYNN, *C. J.*:

This is a criminal complaint charging the defendant with violating section 11 of chapter 149 of the ordinances of the city of Pawtucket by making an address to a religious meeting in a public park owned and maintained by that city. The case was tried first in the tenth judicial district court and following defendant's conviction and sentence he duly appealed to the superior court. However, before trial and by leave of court defendant filed a motion to quash the complaint. Thereupon the superior court certified to this court for determination, in accordance with general laws 1938, chapter 545, § 6, as amended by public laws 1940, chap. 941, sec. 2, certain questions of doubt and importance as to the constitutionality of the ordinance.

Upon consideration thereof we held in substance that the ordinance on its face was not designed to interfere with defendant's rights of freedom of speech, or of assembly, or of religion; that it was part of a regulatory and nondiscriminatory ordinance which was enacted many years ago to secure the maximum reasonable and orderly use of the park by the public for rest and recreation; that in effect it was similar in purpose and principle to the one which was involved in the case of *Davis* v. *Massachusetts*, 167 U. S. 43; that, since the unequivocal statement of law in the *Davis* case had not been overruled by the United States Supreme Court, we could not say beyond a reasonable doubt that the ordinance here was unconstitutional and in violation of the first and fourteenth amendments to the United States

constitution; and further that it did not violate similar guaranties of such rights in the constitution of this state. *State* v. *Fowler*, R. I. , 83 A. 2d 67.

Accordingly the case was remitted to the superior court where, after a trial *de novo* in which jury trial was specifically waived, defendant was convicted and sentenced to pay a fine of $5 and costs. Thereupon he duly prosecuted his bill of four exceptions to this court, but only the first, second and fourth are now being pressed. The third, being neither briefed nor argued, is deemed to be waived under our practice.

The evidence is either admitted or not disputed. The defendant is a resident of Arlington, Massachusetts, and is a minister of the group known as Jehovah's witnesses. He was invited by the local or Pawtucket members of such group to deliver a bible discourse to their assembly to be held in Slater Park on September 3, 1950. The city of Pawtucket owns that park, which has an area of approximately 194 acres and is situated in the residential section of the city. For a great many years it has been maintained as a public park having a variety of facilities for rest and recreation. These range generally from tennis courts to formal gardens. The mere assembly of a group of people, excluding, however, any public address with or without the aid of a sound-magnifying device, could be held without unduly interfering with the use of the park by others.

From 1916 to date use of the park has been regulated in the public interest, by the ordinance in question and a nondiscriminatory administration thereof. That ordinance, chapter 149, contains sixteen sections, many of which are unrelated to the exercise of constitutional rights. It appears in full as an appendix to our previous opinion in this case, to which reference is hereby made. *State* v. *Fowler*, *supra*. Section 11 thereof, which is at the base of the instant controversy, reads as follows: "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The local members of the group had received permission previously to hold religious assemblies and had used the park for such purposes on two preceding Sundays. However, contrary to the express terms of the ordinance, defendant on September 3, 1950 began to address about 400 persons who had assembled there for a religious meeting. Approximately 150 of the assembly constituted members of the religious group and the other 250 were strangers who had come as invitees to such meeting. The latter probably were not residents of the city.

It is not disputed that defendant began to address the meeting with the aid of a microphone and *two* "loud speaker" devices; that he thus proceeded with his address sufficiently to define its religious character before interruption by the police; and that the address as made was admittedly contrary to the literal provisions of the ordinance. After being interrupted politely by the police, defendant was invited to go to the police station where the instant complaint was sworn out and the warrant was issued for his arrest. There is no question of intimidation, excessive force or lack of courtesy on the part of the police before, during or after the meeting. The contrary is admitted.

When the trial was about to commence defendant, with permission of the superior court, made a motion to quash, orally and in writing, on the grounds that the ordinance on its face and as construed and applied is unconstitutional in that it abridges the rights of defendant to freedom of speech, freedom of assembly and freedom of worship, contrary to the provisions of the first and fourteenth amendments to the constitution of the United States and to the provisions of sections 3, 10, and 21 of article I of the constitution of Rhode Island. This motion was denied and is the subject of defendant's first exception.

The defendant concedes in his brief and argument that such motion is based on the identical grounds and raises the same constitutional questions as those involved in the certification which was decided by this court in *State* v. *Fowler*, *supra*. However, he insists that in such opinion we have misconceived the applicable law and have failed to follow the mandate laid down by the United States Supreme Court in many cases which he again cites; and that we have

erroneously relied upon the *Davis* case which is either not the law or not in point. Especially he now emphasizes the cases of *Jamison* v. *Texas*, 318 U. S. 413, and *Commonwealth* v. *Gilfedder*, 321 Mass. 335, to show that the earlier case of *Davis* v. *Massachusetts*, *supra*, is no longer the applicable law of the United States in the circumstances here.

In view of the strong argument on this point we have re-examined the many cited cases but we fail to find wherein any of them lays down an express mandate requiring a different conclusion from the one which we reached and expressed previously on the basis of the pertinent law unanimously enunciated by the United States Supreme Court in the *Davis* case. In our judgment that case concerned an ordinance which in substance and effect is similar in principle and purpose to that involved in the instant case. It was part of a general ordinance designed to control and regulate a common or park which was owned by the state or city and was maintained for the general convenience and comfortable use of the public as a whole. Likewise as part of the regulation it permitted in practical effect what amounted to a prohibition of all religious and political addresses to assemblies in that public common or park, much as we have expressly in the ordinance under consideration herein.

Consequently the *Davis* case is clearly distinguishable from *Jamison* v. *Texas*, *supra*, which is relied on by defendant. There, among other provisions, the ordinance made it unlawful "to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the city of Dallas." Nothing in that ordinance purported to make it unlawful *to distribute* religious pamphlets, and yet the gravamen of the complaint there, as viewed from the evidence, was directed *solely* to the defendant's distribution of religious treatises which had on the back a reference to a book which could be purchased if desired. Therefore on the face of the ordinance and on the facts that case is different from the *Davis* case.

Moreover the ordinance in *Jamison* v. *Texas*, *supra*, differs still further from the one in the instant case in that the ordinance here expressly recognizes the right of re-

ligious groups to assemble and nowhere makes it unlawful to distribute religious pamphlets or to hold religious meetings and services. Therefore the *Jamison* case does not appear to us to carry any mandate, express or implied, that is applicable to the ordinance and facts of either the *Davis* case or the one now before this court.

It will serve no useful purpose to repeat what was said previously in our opinion on the certification concerning the numerous cases relied on by defendant, except perhaps to observe that we find it difficult to determine precisely which of the principles of law as stated in certain of the main opinions are actually concurred in by a majority of the justices of the United States Supreme Court. Likewise in those cases it becomes hard to know, in view of language in the several concurring and dissenting opinions, to what extent some statements of law in the main opinions may have been restricted or inferentially overruled in later cases.

We may again point out, however, that in the *Davis* case the supreme judicial court of Massachusetts unanimously and unequivocally stated the law applicable to the right of an individual member of the public to use a park or common that is maintained and regulated by the state or municipality for use by the public as a whole, and that such statement of the law was expressly approved and incorporated as part of the opinion of the United States supreme court in *Davis* v. *Massachusetts, supra.*

Further the Supreme Court of the United States added thereto the following statement of the law which was unanimously concurred in: "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common *except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe.* The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * *and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State.*" (Italics ours.)

That case, though frequently cited to the Supreme Court of the United States, has not been expressly overruled by that Court. On the contrary it has been distinguished in some form from cases in which it was cited. Ordinarily a court does not distinguish one of its own cases if it really intends to overrule it and to hold that such case no longer states properly the applicable law of that jurisdiction. Moreover it is reasonable to expect that if and when the United States Supreme Court actually intends to overrule the express statements of law in the *Davis* case, it will reserve to itself the right to do so in equally unmistakable language for the guidance of other courts which must conform to that Court's decisions.

But the defendant nevertheless argues that the *Davis* case has been nullified and in effect overruled by implications to be gathered from statements in certain of the cases decided by the United States Supreme Court and discussed in our former opinion. He urges that the decision of the supreme judicial court of Massachusetts in the case of *Commonwealth* v. *Gilfedder, supra,* shows a proper conception of the effect of those decisions and states the law presently governing cases of this kind. Apparently the Massachusetts court in that case did not adhere to the law previously stated by it in the *Davis* case, which had unanimous approval by the United States Supreme Court.

It is significant, however, that the Massachusetts court did not overrule its own decision in the *Davis* case and expressly conceded that it could not find a case where the Supreme Court of the United States had overruled its approval of that case. Furthermore it may be noted that the supreme judicial court of Massachusetts appears to have applied elsewhere, with reference to a certain decision of the United States Supreme Court, the principle that any change by way of extension in the ruling of the case then under consideration "must come from the court which first pronounced that doctrine." *Sherrer* v. *Sherrer,* 320 Mass. 351, 359. We agree with that pronouncement. By analogy here, if the explicit ruling of law in *Davis* v. *Commonwealth,* 167 U. S. 43, is to be overruled, it should come only from the United States Supreme Court.

At any rate the difficulty which we have with the procedure indicated by that opinion is twofold. We are bound to follow the Supreme Court of the United States in its decisions relating to the law governing the United States Constitution. But we are not bound necessarily by another state court's interpretation of or implications from the decisions of the United States Supreme Court. Secondly, we cannot believe it to be a sound constitutional principle to leave the law applicable to the United States constitution to broad implications drawn generally by state courts from opinions of the United States Supreme Court. Conceivably on such a basis there could be forty-eight different deductions or inferences as to what each state court thought a decision of the United States Supreme Court really meant and as to the limitation, if any, on the exercise of such a constitutional right which, according to a particular state court's deduction, had the concurrence of a majority of the United States Supreme Court. In our judgment that is not a desirable or helpful substitute for an authoritative and objective guide which the state courts are expected to follow in such important determinations.

On the other hand, if such a practice were to be adopted, then even if all state courts were in agreement on a particular conclusion deduced inferentially from language in certain opinions of the United States Supreme Court, the latter, which alone has the sole prerogative of determining questions relating to the United States constitution, might well say that a majority of that court had never overruled the *Davis* case; that such case had always been distinguished without intending to overrule it; and that it still is applicable law in the type of case where the question involves only the defendant's right, as a member of the public, to speak in a manner and under conditions which would violate the equal and correlative rights of other members of the public to a reasonable use of the park for its dedicated purpose. In our judgment, for all that appears in the cases thus referred to by the defendant and discussed in our previous opinion, there is nothing which would prevent such conclusions by the United States Supreme Court.

In that connection it is interesting to note the case of

Commonwealth of Pennsylvania v. *Geuss*, 168 Pa. St. 22, which was affirmed by the supreme court of Pennsylvania in 368 Pa. 290, and in which certiorari was denied by the United States Supreme Court since the argument herein. *Geuss* v. *Pennsylvania*, 342 U. S. 912. There the supreme court apparently did not feel constrained to interpret in the manner urged by defendant here the statements of principles appearing in certain opinions of the United States Supreme Court. The Pennsylvania supreme court did not read such opinions as compelling a conclusion that an ordinance must be invalid if, as part of a reasonable regulation, it purports to prohibit an individual from exercising a constitutional right of freedom of speech in a public place. While that case involved an ordinance prohibiting the use of sound trucks on public highways, whereas here we have the use of two "loud speakers" in a small public park in a residential section of the city, yet the underlying principle of prohibiting a constitutional right as part of a reasonable regulation in the public interest is analogous to the regulation in the ordinance as construed and applied in the instant case.

Further, defendant's claim leads to discrimination. It would create in him, as one member of the public, a paramount right whereby he may insist not only that the park be maintained at public expense as a forum for the exercise of his constitutional right but also that he may exercise such right with the aid of sound-magnifying equipment so as necessarily to abridge or destroy the equal and correlative rights of others. Granting his constitutional right to freedom of speech, others also have an equal constitutional right not to be compelled to listen and not to be forced to attend a religious meeting and, as members of the public generally, not to have another person destroy their rights to use the park for its dedicated purposes of rest and recreation. We think that the unequivocal statement of the law as it appears in the *Davis* case is sound, reasonably protects the rights of defendant and others, and should be applied here. In our opinion defendant's right is not paramount to the rights of all others and its exercise is not to be indulged without reasonable limitation. Such a right ceases to be

employed in a reasonable manner when in the nature of things its exercise, as here, is bound to abridge or destroy the equal constitutional rights of other members of the public.

At any rate in the circumstances we fail to find wherein the applicable constitutional law of the United States has been stated so clearly that it amounts to a mandate, as urged by defendant, or that would constrain us to reach a result different from that which we expressed in our previous opinion when the case was before us on the certified questions. *State* v. *Fowler, supra.* On the contrary we prefer to apply the recognized rule which prohibits a state court from striking down a legislative enactment unless it appears beyond a reasonable doubt that it violates a particular provision of the constitution of the United States or of this state. So long as the unequivocal statement of law by the Supreme Court of the United States in the *Davis* case is left standing without a reasonably equivalent statement modifying or overruling it, we find it impossible to say beyond a reasonable doubt that the nondiscriminatory and realistically regulatory ordinance in the instant case is unconstitutional for the reasons asserted by the defendant. The defendant's first exception is therefore overruled.

The motion to dismiss, which is the subject of defendant's second exception, has no place in our practice and for that reason could be overruled. However, it admittedly involves the same essential question of law which has been discussed and decided in our previous opinion and also herein under the plaintiff's first exception. Likewise the defendant relies on the identical question under his fourth exception, because there is no dispute as to the evidence that the defendant is guilty if the ordinance is valid. These exceptions are therefore overruled.

For the reasons stated, all of the defendant's exceptions are overruled, the decision and conviction are affirmed, and the case is remitted to the superior court for further proceedings.

BAKER, J., dissenting:

I am unable to agree with the opinion of the majority of the court. This is the same case which was recently before

us on certified constitutional questions of doubt and importance. See *State* v. *Fowler*, R. I. , 83 A. 2d 67. The case is now here after a trial in the superior court.

In my dissent from the opinion filed in the previous case I set out reasons for my view of the section of the ordinance in question. I am still of the opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is unconstitutional as being contrary to the pertinent provisions of the first and fourteenth amendments to the constitution of the United States. It is unnecessary to restate such reasons as they can be readily ascertained from an examination of the above-mentioned dissent. In the circumstances I am of the opinion that the defendant should be adjudged not guilty and should be discharged.

CAPOTOSTO, J., concurs in the dissenting opinion of Mr. Justice Baker.

APPENDIX B

SUPREME COURT

STATE

v.

WILLIAM B. FOWLER

OPINION

CONDON, *J.*:

This is a criminal complaint which charges the defendant with making a public address to a religious meeting in Slater Park, a public park in the city of Pawtucket, in violation of Section 11 of Chapter 149 of the ordinances of that city. After trial and conviction in the district court the defendant appealed to the superior court and claimed a jury trial.

When the case was called for trial in the superior court and before a jury was impaneled defendant, by leave of court, moved to quash the complaint on the grounds that the ordinance abridged and denied the rights of free assembly,

free speech, and free worship guaranteed by the first and fourteenth amendments to the constitution of the United States and by the constitution of this state. The trial justice declined to rule on the motion because he deemed the constitutional questions thus raised to be of such doubt and importance that they should be certified to this court for our determination pursuant to general laws 1938, Chapter 545, § 6, as amended by public laws 1940, Chap. 941, Sec. 2. Under that statute the superior court is authorized to certify only the questions raised and not the cause itself. *United States Trust Co.* v. *Tax Assessors of City of Newport*, 47 R. I. 420. The trial justice accordingly entered a formal order certifying the following specific questions:

> "Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied unconstitutional because it abridges the rights of the defendant to Freedom of Speech, Freedom of Association, and Freedom of Worship, contrary to the First and Fourteenth Amendments to the United States Constitution.
>
> "Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, contrary to the provisions of Article I of the Constitution of the State of Rhode Island, with particular reference to Sections 3, 10, and 21."

Since only those questions and not the case are before us we must pass upon the constitutionality of the ordinance without reference to the circumstances out of which the case arose and was originally heard in the district court.

On its face the ordinance, which is hereinafter set out in full in the appendix, prescribes in a series of sixteen sections certain conditions under which any person may lawfully avail himself of the privilege of using the parks belonging to and maintained by the city. One of such conditions is contained in Section 11 which defendant is charged with violating. That section reads as follows:

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or

society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.".

The prohibition therein is not directed at any particular religious group, but is general and applies without question to all such groups and to all political groups as well.

The ordinance as a whole represents an exercise of the power which the city council has over the management and control of municipal property. Apparently in the exercise of that power the city council decided that the city's parks would more certainly serve the purpose of their establishment as areas of rest and recreation if they were not allowed to become forums for either religious or political controversy. This ordinance is not a legislative act of recent origin nor is it specially directed at the activities of the sect which the defendant represents. Rather it is a municipal regulation of long standing as is evidenced by the date of its approval, April 17, 1916, and hence it antedates by many years the recent prominence of that sect in federal litigation.

We are satisfied that the ordinance was designed not to interfere with freedom of assembly, nor to fetter freedom of speech or prohibit religious worship, but solely to guard the city's parks from being used for activities that reasonably could lead to annoyance and disorder and to that extent defeat the ends for which the city had established the parks as public areas of rest and recreation. The prohibitions contained in the ordinance including Section 11 are quite definitely directed to that end. Out of its experience in conducting the prudential affairs of the city, the city council evidently was convinced that public addresses to religious or political groups in the parks would not be consistent with the purpose for which the parks were being maintained at public expense. Viewed in that light the ordinance appears to be a reasonable police regulation, and as such the people of Pawtucket have long acquiesced in its validity. It is attacked here, for the first time as far as we are aware, thirty-five years after its approval.

The defendant claims that he has a constitutional right to speak in any public park. He concedes that the city may

reasonably regulate that right but that it cannot wholly prohibit its exercise. In other words, he asserts not only the right of free speech but also the privilege of a free forum in which to exercise that right. And he contends that he is supported in such view by the highest judicial authority. He relies on a number of recent cases decided by the Supreme Court of the United States where various kinds of municipal ordinances or administrative practices were held violative of the rights guaranteed by the first amendment to the constitution of the United States and made applicable to the states by the fourteenth amendment. Many of those cases do not involve an ordinance which conditions the lawful use of a municipally owned park upon compliance with certain definite regulations that are not discriminatory. However, some of them do involve such an ordinance or the opinions refer to the right to use such a park. The most important of those cases and the ones upon which defendant appears to rely most strongly are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558; and *Niemotko* v. *State of Maryland* and *Kunz* v. *People of the State of New York*, both reported in 19 Law Week 4095 and 4102, and decided by the Supreme Court of the United States January 15, 1951.

The defendant in his brief has quoted in part from and appears to lay particular stress upon the language of Mr. Justice Roberts announcing the decision of the court in *Hague* v. *Committee for Industrial Organization, supra*, at page 515, as follows: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Apparently the learned justice was only speaking for himself and two of his associates. Moreover, we are at a loss to know what was intended by that declaration especially since it was made in essaying a distinction between the case then before the court and *Davis* v. *Massa-*

chusetts, 167 U. S. 43, which upheld the conviction of Davis for preaching on Boston Common violation of an ordinance like the one in the case at bar. Singularly enough that case was not overruled in the *Hague* case and as far as we are aware has not been overruled, although the court has had occasion to refer to it in several later cases.

In the circumstances *Hague* v. *Committee for Industrial Organization, supra*, can hardly be considered decisive of the case before us. Incidentally in the later case of *Saia* v. *New York*, 334 U. S. 558, which involved the use of a "loud speaker" in a public park, Mr. Justice Jackson dissented and made the following observation concerning the quotation from Mr. Justice Roberts' opinion in the *Hague* case: "The case of *Hague* v. *C. I. O.*, 307 U. S. 496, cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. The quotation in the Court's opinion today had the support of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of that quotation as an authority." 334 U. S. 558, 568, Footnote 1. If notwithstanding such criticism, the previously-quoted language of Mr. Justice Roberts in the *Hague* case, *supra*, is to be deemed as binding authority impliedly overruling *Davis* v. *Massachusetts*, *supra*, a great service to state courts would be performed if the Supreme Court itself would make that overruling clear and definite so that courts would have no reason to be misled in the future. We cannot safely rely upon some other court's interpretation of the language and effect of that case. So long as the *Davis* case stands without being specifically overruled by the Supreme Court itself, it is difficult for us to say that an ordinance substantially the same as the one involved in the *Davis* case is nevertheless unconstitutional beyond a reasonable doubt.

The defendant, however, points to *Saia* v. *New York* and *Niemotko* v. *State of Maryland*, *supra*, decided since the *Hague* case, as clear instances where the Supreme Court has definitely included public parks, as well as highways, within the orbit of its decisions protecting the freedoms of the first amendment from local abridgment or denial. In each

of those cases it is true that the locus of the forbidden act was a public park but there the similarity to the case at bar ends. In the *Niemotko* case there was no ordinance of general application involved but rather an act of arbitrary discrimination by an administrative official. Indeed at the very outset of its opinion in that case the court observed that there was no ordinance regulating the use of the park in question.

As far as the *Saia* case is concerned the ordinance there prohibited the use of a "loud speaker" device which casts its sound directly upon streets and public places. A public park was only incidentally involved because the defendant set up his "loud speaker" in such a place. He was arrested for using a "loud speaker" in defiance of the ordinance, not for making a public address in the park. The ordinance in question apparently was not invoked by the city to prohibit public addresses to a religious meeting in the park. The court in a five-to-four decision held that the city could not ban the use of a loud speaker in the manner provided in that ordinance because such use was comprehended within the constitutional guarantee of freedom of speech under the first amendment. It was upon that question that the court split. We do not think that point of decision is relevant to the particular controversy in the case at bar. Moreover the authority of the *Saia* case would seem to be questionable in view of the decision in *Kovacs* v. *Cooper*, 336 U. S. 77.

In the *Kovacs* case the court upheld an ordinance which probibited the use of "loud speakers" on the streets and public places of Trenton, New Jersey. Mr. Justice Frankfurter and Mr. Justice Jackson who had dissented in the *Saia* case concurred in the decision and commented adversely on the *Saia* decision. The former said it would be "to start with an unreality" to rest the *Kovacs* decision on that case, and the latter expressly said that *Kovacs* repudiated *Saia*. Three justices who had concurred in the *Saia* decision dissented in the *Kovacs* case and also stated

that the decision repudiated the holding in the *Saia* case. Later in *Niemotko* v. *State of Maryland, supra*, Mr. Justice Frankfurter concurring in a separate opinion said: "In *Kovacs* v. *Cooper*, 336 U. S. 77, part of the Court construed the ordinance as allowing conviction for operation of any sound truck emitting 'loud and raucous' noises, and part construed the ordinance to ban all sound trucks. The limits of the decison of the Court upholding the ordinance are therefore not clear, but the result in any event does not leave the *Saia* decision intact." And perhaps *Breard* v. *City of Alexandria*, 19 Law Week 4375, is a further indication of a more restrained approach to the solution of conflicts over local limitations on those freedoms. One of the dissenting justices therein goes so far as to say that such decision overrules certain prior cases in which the court declared invalid certain municipal ordinances as violative of liberty of speech, press and religion. In any event explicit clarification would seem to be necessary if the trial courts are to be given a clear guide for deciding in those cases that legislative enactments are beyond reasonable doubt in conflict with the constitution of the United States.

We are of the opinion that the other cases cited by the defendant afford no stronger support to his contention than those above mentioned and, therefore, we need not discuss them here. Moreover we are convinced that the case at bar is clearly ruled by *Davis* v. *Massachusetts*, 167 U. S. 43. The justice of the district court expressly relied upon that case in finding the defendant guilty. Perhaps a brief discussion of its background should be made here because it is obviously a decision that the Supreme Court of the United States has been reluctant to disturb in spite of language in a number of more recent opinions which might seem to be inconsistent therewith. In our opinion

it is a case more nearly on all fours with the one at bar than any of the cases relied upon by the defendant.

Davis contended that he had a constitutional right guaranteed by the fourteenth amendment to the constitution of the United States to preach the gospel on Boston Common notwithstanding an ordinance which expressly forbade the making of a public address upon any public grounds except by permission of the mayor. The supreme judicial court of Massachusetts in upholding his conviction unanimously held that the ordinance was constitutional. *Commonwealth* v. *Davis,* 162 Mass. 510. That court held that the constitutionality of the ordinance was not open to doubt and that it was a fallacy to assume that it was "directed against free speech generally * * * whereas in fact it is directed toward the modes in which Boston Common may be used." It is interesting to note that this opinion was rendered by Mr. Justice Holmes.

In a concurring opinion in *Kovacs* v. *Cooper,* 336 U. S. 77, 95, Mr. Justice Frankfurter said: "The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes. * * * Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics." Few will deny the accuracy of this estimate of Mr. Justice Holmes' judicial disposition and his basic influence in promoting this branch of the law to its present state of development. Apparently, however, he was far from ready, despite his solicitude for these precious freedoms, to deprive a municipality of its power to control the use of its own property.

After Mr. Justice Holmes had been elevated to and served on the federal Supreme Court for eight years he apparently continued to be of the opinion that state laws should not be hurriedly overthrown as violative of the bill

of rights or the fourteenth amendment. Speaking for a unanimous court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, he said that "we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

When *Commonwealth* v. *Davis*, *supra*, was appealed by Davis to the Supreme Court of the United States he contended that the local law under which he was convicted was contrary to the fourteenth amendment to the constitution of the United States. There Mr. Justice White, speaking for a unanimous court, rejected such contention saying: "The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State." And he concluded with the following words, so apposite in our opinion to the case at bar: "The plaintiff in error cannot avail himself of the right granted by the State and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law." Unless the *Davis* case is no longer the law the ordinance in question here is valid and binding upon the defendant.

Before concluding our consideration of this contention perhaps some reference should be made to defendant's argument that a religious address may be permitted in a public park without contravening the concept of separation of church and state as expounded in the recent case of *McCollum* v. *Board of Education, Etc.*, 333 U. S. 203. Defendant has pressed this point at considerable length in his brief and in his oral argument. This appears to be an act of supererogation, as the state is not claiming that the ordinance is valid on the strength of the *McCollum* case, but frankly concedes that the parks may be used for certain religious purposes. We quote the following from page 19 of its brief: "There is nothing in this ordinance, which would prohibit religious services of any kind from being held in the public parks of the City. There is nothing in this ordinance which prohibits or restricts any individual from offering prayer or singing hymns or conducting a religious ritual in the public parks. It is only an address on such an occasion that is prohibited by this ordinance." We are therefore not called upon to decide whether the constitutional doctrine of the *McCollum* case which denies the use of a public school for a period of religious instruction nevertheless permits the use of public parks for religious services.

Defendant has also contended that section 11 violates the rights guaranteed by sections 3, 10 and 21 of article I of the constitution of this state. Although defendant did not point out those sections specifically in his motion to quash, as he should have done, the trial justice in his order of certification assumes that they are the sections relied upon. We have no hesitancy in saying that insofar as those sections secure the freedoms of assembly, of religion, and of speech, section 11 of the ordinance here in question does not in any true sense violate them.

This court has not given to those guarantees the wide sweep which the federal Supreme Court in the last decade or two has given to similar guarantees in the first amendment to the federal constitution. Of course we are in complete accord that such rights must be vigilantly guarded not only from direct but also from indirect attacks. Insidious no less than open assaults upon them must be sternly resisted if they are not to be lost by erosion. But we are also aware that true liberty of any kind cannot exist without public order. Preservation of the balance between liberty on the one hand and authority and order on the other has ever been a difficult task for the courts and no less difficult for those immediately charged with the duty of maintaining public order. It should be our constant concern while safeguarding the first not to go so far as to make unduly difficult or perhaps impossible the discharge of the other.

In such frame of reference we have considered the questions propounded here. As far as our state constitution is concerned we see nothing contrary thereto in this ordinance. As to the federal constitution we follow the law as declared by the United States Supreme Court. It has unequivocally declared in *Davis* v. *Massachusetts, supra*, that an ordinance like the one in the case at bar does not violate that constitution. In no later decision do we find that the Supreme Court has definitely overruled that case and decided to the contrary. We, therefore, hold on the authority of that case that the ordinance in question does not violate the federal constitution.

Accordingly we answer in the negative each question set out in the order of certification, and the papers in the case are ordered sent back to the superior court for further proceedings.

BAKER, J., dissenting. I am unable to agree with the majority opinion because in my judgment section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is clearly prohibitory and not in any sense merely regulatory in respect to the right of free speech in a public park in that city. The section does not even contain, for what it may be worth, a provision that a license may be issued by a municipal authority permitting the making of an address in any manner, at any time, or in any place. It may be that other sections of the chapter are regulatory in nature, but they in no way refer to or have any connection with section 11, which is the only portion of the chapter material to the questions before us. Since section 11 is plainly distinct and separable from the rest of the chapter the validity of that section should rest upon its own language without reference to other clearly unrelated provisions of said chapter.

Also in my opinion *Davis* v. *Massachusetts*, 167 U. S. 43, upon which the majority of the court relies, cannot properly be held to govern the instant case. While it is true that the above-cited case has never been specifically overruled by the Supreme Court of the United States, nevertheless in my judgment that court, in later decisions where it referred to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, *Jamison* v. *Texas*, 318 U. S. 413, *Saia* v. *New York*, 334 U. S. 558, and *Niemotko* v. *State of Maryland*, 19 Law Week 4095. See also *Milwaukee County* v. *Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the amendments of the constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

In addition it may be noted that in *Commonwealth* v.

Gilfedder, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the first amendment to the constitution of the United States. At page 342 of that opinion the court makes the following comment: "We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States."

For the reasons stated it is my opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket is contrary to the pertinent provisions of the first and fourteenth amendments to the United States constitution. I therefore answer in the affirmative the first question certified to us by the trial justice.

In view of the fact that I have construed section 11 of the ordinance to be invalid under the federal constitution, and further as the defendant in his motion to quash did not specifically point out the particular sections of the constitution of this state which he alleges are violated by section 11, as our well-established practice requires, I am of the opinion that it is unnecessary for me to answer the second question certified by the trial justice.

CAPOTOSTO, J. concurs in the dissenting opinion of Mr. Justice Baker.

Appendix

"Chapter 149.

Approved August 17, 1916.

An Ordinance Providing Rules and Regulations for Public Parks in the City of Pawtucket.

It is ordained by the City Council of the City of Pawtucket as follows:

Section 1. No person is allowed to land or take passengers on any boat from the banks of the pond. Any person entering or leaving a boat must do so at the landing provided therefor.

Sec. 2. No person is allowed to occupy the tennis court for more than one hour if other patrons of the Park are waiting to play. While playing on the tennis court patrons must wear shoes without heels or spikes.

Sec. 3. No person is allowed to use profane language in the Park and Ladies and Children must not be annoyed or molested by anyone.

Sec. 4. Slater Park shall be open to the public from sunrise until eleven o'clock afternoon from April first to November first, and from sunrise until ten o'clock afternoon from November first to April first in each and every year; and no person shall enter or be within the limits of said park except between said hours without permission from the Commissioners or Superintendent of Parks.

Sec. 5. No person shall take, pluck, injure, destroy, cut, mark or deface any flower, root, plant, shrub, tree, building, fence, monument or other property in any park. No person shall throw a stone or other missile in any park.

Sec. 6. No person shall ride or drive within any park at a rate of speed exceeding ten miles per hour. No person shall ride or drive any animal, bicycle or other vehicle except upon the driveways; nor ride or drive any animal, bicycle or vehicle upon other than the right hand side of the driveways, except to cross such driveway or to turn out for some obstruction, or for some animal, bicycle or other vehicle going in the same direction.

Sec. 7. Automobiles, or other vehicles, must not be driven faster than ten miles per hour within the limits of the Park.

Sec. 8. No person shall drive any heavy team, nor any swill or residuum cart, nor any team or carriage for the purpose of business, into any park, without permission from the Commissioners or Superintendent of Parks.

Sec. 9. All vehicles while within the limits of the Park must conform strictly to law regarding lights to be carried.

Sec. 10. No person shall bathe or fish in, nor go into, nor send any animal into, any of the waters of any park, nor disturb any of the fish, birds, water fowl or animals in any park, nor throw or place any article or thing in said waters; provided however, that fishing in any such waters from boats owned by the City of Pawtucket may be allowed by the park commissioners at such times and under such regulations and upon payment of such fees as said commissioners may from time to time prescribe and determine.

Sec. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

Sec. 12. No person, being the owner or having the charge or custody of any dog, cat, fowl, goat, swine or neat cattle, shall allow such dog, cat, fowl, goat, swine or neat cattle to enter any public park or to remain therein.

Sec. 13. No person, except in the employ of the commissioners or superintendent of parks, shall light, build or make any fire in any park, square or public grounds.

Sec. 14. No automobile, or other vehicle, shall be permitted to remain stationary in any part of said park for a longer period than ten minutes, except in such locations as shall be assigned for such purpose by the park commission; and any person in charge of such automobile or other vehicle shall at any time, upon the direction of any officer, immediately remove such automobile or other vehicle to such location as such officer shall direct.

Sec. 15. Any person violating any of the provisions of this ordinance shall be fined not exceeding twenty dollars,

or be imprisoned for a term not exceeding ten days for each offense.

Sec. 16. This ordinance shall take effect upon its passage."

APPENDIX C

SUPREME COURT OF RHODE ISLAND

No. 9264

STATE

v.

WILLIAM B. FOWLER

On Appeal to the Supreme Court of the United States

STIPULATION THAT A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

It Is Hereby Stipulated and Agreed that this stipulation can be filed with the papers on appeal to the Supreme Court of the United States and printed as an appendix to the statement as to jurisdiction.

It Is Further Stipulated that appellee agrees that this appeal presents to this Court a substantial federal question that ought to be determined by the Supreme Court of the United States. The appellee does not, however, agree that the ordinance is invalid, either on its face or as construed and applied, it being understood that it will contend before the Supreme Court of the United States that the ordinance is, in all things, constitutional upon its face and as enforced against the appellant.

Dated August 22, 1952.

RAYMOND J. GUTHRIE,
Attorney for Appellee,
Assistant Attorney General;
[illegible]
JOHN McGUIRE,
HAYDEN C. COVINGTON,
Attorneys for Appellant.